Supreme Court, U.S.
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No. 94-1492

In The

Supreme Court of the United States

October Term, 1994

DEAN M. CRIST,

Petitioner,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, WA-SWA-GON TREATY ASSOCIATION, THOMAS MAULSON, ROBERT MARTIN, NICK HOCKINGS, and GILBERT CHAPMAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The respondents object to the form and substance of the "Questions Presented For Review" in the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and believe the questions should be as follows:

1. Is there any need for this Court to determine whether the district court abused its discretion in denying the petitioners' motion to file an amended answer – a denial that was affirmed by the court of appeals?

2. Has the petitioner shown a basis under Supreme Court Rule 10 for reviewing the decision of the Court of Appeals for the Seventh Circuit?

PARTIES

The names of the parties are as they appear in the caption of the case, except that Michael Allen has been removed as a plaintiff. Mr. Allen, who was previously included in his official capacity, is no longer tribal president. That office is now held by Thomas Maulson, who was already a plaintiff.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

REASONS FOR DENYING A WRIT 4

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Cox v. Louisiana, 379 U.S. 536 (1965) 8

Foman v. Davis, 371 U.S. 178 (1962) 6

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 8

Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (7th Cir. 1983) 1

Lac Courte Oreilles Band v. Wisconsin, 775 F. Supp. 321 (W.D. Wis. 1991) 1

Lac du Flambeau Band v. Stop Treaty Abuse-Wisconsin, Inc., 759 F. Supp. 1339 (W.D. Wis. 1991) 2

STATUTES

42 U.S.C. § 1982 ..... 3, 8

OTHER AUTHORITIES

Fed. R. Civ. P. 15(a) 6

Supreme Court Rule 10 4

Supreme Court Rule 10.1(a) 6

Supreme Court Rule 10.1(c) 6

OPINIONS BELOW

The names of the opinions below are correctly identified in the petition. The citation to the first opinion of the district court is, however, incorrect. The correct citation is 781 F. Supp. 1385 (W.D. Wis. 1992).

STATEMENT OF THE CASE

The plaintiffs in this action are the Lac du Flambeau Band of Lake Superior Indians, individual members of the band, and Wa-Swa-Gon Treaty Association, an unincorporated association of members of the band and others. The petitioner is a member and co-founder of a for-profit corporation called Stop Treaty Abuse-Wisconsin, Inc. The Lac du Flambeau Band is one of the Lake Superior Chippewa bands that have treaty-retained usufructuary rights to engage in off-reservation hunting, fishing, and trapping and gathering on public lands in the northern third of Wisconsin. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir. 1983) ("Voigt").[1] The plaintiffs brought this action on February 1, 1991, to enjoin the defendants from interfering with their ability – pursuant to their usufructuary rights – to spear walleyes and muskellunge.

[1] The court of appeals, in its 1983 decision, remanded the case for a determination of the scope of the state authority to regulate off-reservation hunting, fishing and gathering. The case generated numerous reported decisions and ended with entry of final judgment in *Lac Courte Oreilles Band v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991).

On March 15, 1991, the district court granted the plaintiffs' request for a preliminary injunction. *Lac du Flambeau Band v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F. Supp. 1339 (W.D. Wis. 1991). The injunction remained in effect for the whole of the 1991 spearing season. The district court also entered a scheduling order that, in part, required the parties to file any amendments to their pleadings by July 1, 1991, and file any dispositive motions by October 1, 1991 (later extended to October 15, 1991). Shortly before the deadline for the filing of dispositive motions, the plaintiffs moved for summary judgment. On December 2, 1991 – a week after the motion for summary judgment had been fully briefed – Crist and Stop Treaty Abuse requested leave to file an additional, supplemental, brief in which they raised, for the first time, the claim that, notwithstanding the Seventh Circuit Court of Appeals' 1983 decision in *Voigt*, the doctrine of *res judicata* precluded the plaintiffs from exercising the ability to hunt, fish, and trap and gather on public lands because of rulings by the Indian Claims Commission in the 1970s.

The plaintiffs moved to strike the defendants' proposed "supplemental response" and, on December 24, 1991, Crist and Stop Treaty Abuse moved to amend their answer; the proposed amended answer contained the additional defense found in the supplemental response to the plaintiffs' motion for summary judgment.[2] In an order

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[2] The motion of December 24, 1991, was actually the second attempt by Crist and Stop Treaty Abuse belatedly to amend their complaint. In a motion filed in early October, 1991, they sought leave to file an amended answer in which they alleged

entered on January 6, 1992, the district court denied the defendants' motion to amend and granted the plaintiffs' request to strike the defendants' supplemental response. The court also granted the plaintiffs' motion for summary judgment on the plaintiffs' claim that the defendants' activities had violated rights enjoyed by the plaintiffs under 42 U.S.C. § 1982. A-20 and A-21.

On appeal by Crist and Stop Treaty Abuse, the Court of Appeals for the Seventh Circuit reversed the district court's summary judgment, reinstated the preliminary injunction, and remanded for trial on the sole issue whether, in interfering with the plaintiffs' treaty-reserved fishing rights, the defendants were motivated by racial animus. A-48. On the other hand, the court of appeals specifically affirmed both the district court's decision denying the defendants' motions to amend their answer and the district court's decision granting the plaintiffs' motion to strike the defendants' supplemental response. A-48.

Upon remand, the district court conducted a bench trial and on February 7, 1994, issued an opinion in which it found that the defendants' activities were motivated by racial prejudice, that the activities would not have occurred but for the prejudice, and that the plaintiffs' rights under 42 U.S.C. § 1982 had been violated. A-67 through A-75. The court permanently restrained Crist and Stop Treaty Abuse from interfering with the plaintiffs' exercise of off-reservation fishing rights and, on

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that the plaintiffs lacked sufficient Indian "blood quantum" to bring the instant action. The district court denied the motion at a hearing on October 31, 1991. A-2.

appeal again by Crist and Stop Treaty Abuse to the Court of Appeals for the Seventh Circuit, the court affirmed the district court's judgment on the merits in all respects. A-84.

SUMMARY OF ARGUMENT

There is no reason for this Court to issue the requested writ. The petitioner has failed to satisfy any of the criteria in Supreme Court Rule 10 for reviewing the decision of the Court of Appeals for the Seventh Circuit.

REASONS FOR DENYING A WRIT

1. The issue raised in Crist's petition relating to rulings of the Indian Claims Commission ("ICC") is not properly before this Court. The ICC rulings made up the "defense" that Crist and Stop Treaty Abuse attempted to assert for the first time in their December 2, 1991, "supplemental response" to the plaintiffs' motion for summary judgment and again in the amended answer that, on December 24, 1991, they sought leave to file. The ICC "dockets" referred to in Crist's petition (p. 3) were part of the untimely "supplemental response" stricken from the record by the trial court. They are not part of the record in this case and Crist's reference to them in his petition is improper.

The district court rejected the proffered defense not only because, in light of earlier decisions in the *Voigt* case, it would have been futile to permit the defendants

to file an answer containing the defense, but because the proposed amended answer was untimely. The court's scheduling order required that all amendments to pleadings be made by July 1, 1991, and when, almost six months later, Crist and Stop Treaty Abuse asked the court for permission to amend their answer to include the matter of the ICC rulings, the plaintiffs' summary judgment motion had been fully briefed and the scheduled trial was only six weeks away. Although Crist and Stop Treaty Abuse contended on their first appeal that the district court had abused its discretion in denying their motions to amend (and to file the supplemental response to the plaintiffs' motion for summary judgment), the court of appeals disagreed and, on the basis of the untimeliness of the defendants' filings alone, affirmed the district court in this regard:

> [Stop Treaty Abuse] . . . makes no convincing argument why the district judge abused her discretion in not allowing the amendments and supplemental brief due to their untimeliness. That alone is reason to deny STA's appeal of this issue, and avoids discussion of its convoluted arguments regarding *res judicata*, which, in any event, we find an unpersuasive collateral attack on our earlier decision in [*Lac Courte Oreilles* v.] *Voigt* [, 700 F.2d 341, *appeal dismissed and cert. denied sub nom. Besadny v. Lac Courte Oreilles*, 464 U.S. 805 (1983)]. *See Nevada v. United States*, 463 U.S. 110 (1983).

A-32.

The decision of the court of appeals affirming the trial court's discretionary denial of Crist's and Stop Treaty Abuse's motion to amend their answer neither

conflicts with any decision of any other appellate circuit court or any state court of last resort nor departs from the accepted and usual course of judicial proceedings. *Cf.* Supreme Court Rule 10.1(a). Moreover, the circuit court's affirmance of the trial court's enforcement of a scheduling order is not "an important question of federal law" which should be decided by this Court. *Cf.* Supreme Court Rule 10.1(c). Crist has failed utterly to demonstrate how the issues raised merit this court's examination.

Leave to amend pleadings may be denied for "apparent or declared reason[s]" such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). As a general rule, the denial by a district court of a motion to amend pleadings under Fed. R. Civ. P. 15(a) is subject to reversal only if the district court abused its discretion by refusing to permit the amendment "without any justifying reason." *Foman*, 371 U.S. at 182. In the instant case, the district court provided the necessary "justifying reason[s]" and Crist has simply offered nothing at all to show that the district court's rejection of his six-month-late amendment was unjustified.

2. Crist's argument that the district court's finding of racial animus will have a "severely chilling" effect on "all future political protest" is nonsense. Crist's activities clearly did not constitute expression of the kind protected by the First Amendment. In any event, the court of appeals addressed at length in its first opinion the issue here raised by Crist:

> While the first amendment in fact does preserve the right to speak offensively, it does not provide a shield against the logical import of that speech. Using the allowed speech as evidence of a prohibited action does not negate the right to so speak. Conduct may be prohibited, even if the conduct is evidenced or carried out by speech, without abridging the right of free speech. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). It bears keeping in mind that even if . . . [the plaintiffs] eventually prevail, *injunctive relief will not prevent STA members from shouting racist invective at spearing sites, only from engaging in racially-motivated activity that interferes with the fishing.*

A-39 and A-40 (emphasis added). As the court of appeals recognized, the plaintiffs did not sue Crist and Stop Treaty Abuse because Crist and the other defendants shouted racial slurs and opposed spearing. The action was filed because the defendants, including Crist himself, interfered with the plaintiffs' usufructuary fishing rights by blocking boat landings, forming flotillas to create high wakes, bringing violent mobs to the landings, and engaging in the other activities catalogued by the court at A-56 through A-67. The significance of the defendants' racial invective was solely as evidence of the defendants' racial animus, an element of the plaintiffs' civil-rights claim.[3]

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[3] Crist's assertion that he was found liable "without a shred of evidence of anti-Chippewa animus except for Crist's taking a leading role in the protests" flies in the face of the extensive and uncontradicted evidence in the record. In its opinion in the second of the appeals in this case, the court of appeals noted that the district court "marshalled six pages of evidence to show that defendants' interference with plaintiffs' spearfishing was

Crist's argument in this regard is considerably muddled by the additional assertion – wholly unsupported by the record in this case – that he has been driven "towards financial ruin" by the plaintiffs' action and that the "chilling effect of attorney liability for political protest under the civil rights statutes is onerous and portentous for others." Any financial liability, of course, is not the result of Crist's racial slurs and epithets. It is the result of his activities in preventing the plaintiffs from exercising rights protected by § 1982. As this Court said in *Cox v. Louisiana*, 379 U.S. 536, 555 (1965), in quoting from and reaffirming what was earlier said in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." If Crist had limited his activities to speech – even racially offensive speech – the plaintiffs would not have brought this action.

The injunction entered by the district court – and upheld by the court of appeals in its second decision – will not prevent Crist from engaging in political protest. Only if he interferes with the legal rights of others does he risk liability. This proposition is so well established by decisions of this Court as to need no further explication in the present one. *Cox v. Louisiana* was decided 30 years

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racially motivated." A-79. Moreover, several pages of the district court's opinion were devoted to "Incidents Involving Defendant Crist" and contain ample evidence of Crist's racial animus. A-62 to A-67.

ago; it has not been overruled and the court of appeals did not depart from it. Crist has failed to show that the court of appeals' decision is in conflict with that of another court of appeals (or with that of a state court of last resort) on the same matter; he has failed to show that the court of appeals decided an important question of federal law which should be settled by this Court; and he has failed to show that the court of appeals decided a federal question in a way that conflicts with decisions of this Court. No important question is raised at all by the petition for a writ of certiorari.

CONCLUSION

For all of the reasons above, the petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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